86-1273

Supreme Court, U.S.
FILED
FEB 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT NO.

IN THE SUPREME COURT OF THE UNITED STATES

1986-87 TERM

STEVEN LANIER CUMBIE,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA
(Case No. 86-141)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Was Petitioner denied his Fourth Amendment right to be free from unreasonable search and seizure in a State prosecution for trafficking in cocaine wherein:

A. The search warrant was issued on an affidavit relaying insufficient information from an anonymous source to establish probable cause;

B. None of the information provided by an anonymous source was corroborated at all by any independent police work.

LIST OF PARTIES

The parties of this proceeding are Steven Lanier Cumbie, the Petitioner, and the State of Alabama.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The conviction of Petitioner in the Circuit Court of Mobile County, Alabama was affirmed without opinion by the Court of Criminal Appeals of Alabama on September 9, 1986; Application for Rehearing was overruled without opinion on October 14th, 1986; and Petition for Writ of Certiorari to the Supreme Court of Alabama was denied without opinion on December 5th, 1986.

GROUNDS INVOKING JURISDICTION

The statutory provision which confers jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. Section 1257(3), which permits review by the Supreme Court of the United States of America by Writ of Certiorari of the judgment of the highest court of a state where any right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

II. FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

III. CODE OF ALABAMA (1975)

Section 20-2-80. Trafficking in Cannabis, Cocaine, etc.; Mandatory minimum terms of imprisonment.

"Except as authorized in Chapter 2, Title 20:
...(2) Any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in Section 20-2-25(1), is guilty of a felony, which felony shall be known as 'trafficking in cocaine'. If the quantity involved: (a) Is 28 grams or more but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $50,000.00..."

STATEMENT OF THE CASE

Search warrant affidavit stating:

"Within the past 8 hours, information was received from an annonymous source that Steve Cumby and another individual named Donnie Chestang had made a trip to Miami, Fla. and returned to the above address with a large quanity of cocaine. Within the past year, the Mobile Police Dept. has received three anonymous tips relating detailed information concerning drug dealing by these two individuals. Much of this information has been proven to be true and the details were those normally associated with those of violators of controlled substances laws.

In addition to this information, corporals J. Stokes and R. Osborne have two independent informants who in the past have been proven to be true and reliable. These informants have disclosed to Cpl.s Stokes and Osborne that these individuals deal in cocaine and marijuana in large quantities. These informants have seen controlled substances in the possession of both Donnie Chestang and Steve Cumby. Records maintained by the Mobile Police Dept. reveal that a white male Donnie Chestang, has an arrest record for controlled substances in 1983 Surveillance of the above address by DEA and ABI revealed numerous activities

by several people. Several persons visiting the residence stayed between one and two minutes." Was sworn to by David A. Luker on the 17th of September, 1984 before a a Mobile County District Court judge in order to obtain a search warrant for 1209 McRae Avenue residence of w/m Steve Cumbie"

Search warrant was issued based upon this affidavit and Steven Lanier Cumbie was arrested after execution of the search warrant and charged with trafficking in cocaine.

At the preliminary hearing before Mobile County District Court Judge Douglas Johnstone, David A. Luker, the affiant was the only witness who testified. He testified to the following:

1. He did not tell the issuing judge how Steve Cumbie traveled to Miami, Florida.

2. He did not tell the issuing judge how Steve Cumbie traveled back from Miami, Florida;

3. He did not check with anybody to see how Steve Cumbie allegedly traveled to and from Miami, Florida;

4. He did not verify in anyway whatsoever that the alleged trip to Miami, Florida occurred;

5. Other than the anonymous source he had no information whatsoever that Steve Cumbie went to Miami, Florida;

6. He did not expound upon the alleged three (3) anonymous tips or

any of the detailed information concerning drug dealing;

7. He admitted that those three (3) anonymous tips and that detailed drug information could be twelve months old;

8. He did not tell the issuing judge how much of the details normally associated with drug violators was proven true and how much was proven false;

9. He did not tell the issuing judge what those details were that were normally associated with drug violators;

10. He did not advise the issuing judge when, where, or how the two (2) independent informants had been proven to be true and reliable.

11. Other than to say that the informants had seen controlled substances in Steve Cumbie and Donnie Chestang's presence, he did not tell the issuing judge when or where the informants had seen controlled substances in the alleged possession of Steve Cumbie.

12. He did not even verify that the white male, Donnie Chestang, with an arrest record for controlled substances in 1983 was one and the same as the Donnie Chestang referred to in his affidavit for a search warrant;

13. And he didn't remember whether or not he told the issuing judge that the surveillance was going on at the time he requested the warrant.

After hearing all of this testimony and reading the search warrant affidavit,

Mobile County District Court Judge Douglas I. Johnstone, granted Steven Lanier Cumbie's Motion to Suppress the evidence.

After a District Court Judge had granted the Motion to Suppress the evidence seized under the search warrant issued based upon the affidavit contained herein, the Mobile County District Attorney's Office presented the State's case to the Mobile County Grand Jury and an indictment for trafficking in cocaine was returned. Prior to trial, Mobile County Circuit Court Judge Robert L. Byrd, on Steven Lanier Cumbie's Motion to Suppress the evidence read the transcript of the District Court Preliminary hearing, and denied Steven

Lanier Cumbie's Motion to Suppress the evidence. Thereupon, Steven Lanier Cumbie stipulated a prima facie case would be proved, preserved the right to appeal violation of this Fourth Amendment right to be free from unreasonable search and seizures and was sentenced to 15 years imprisonment and fined $50,000.00.

On appeal to the Court of Criminal Appeals of Alabama, the Court denied Steven Cumbie all argument and affirmed without opinion the decision of the Mobile County Circuit Court. The Court of Criminal Appeals of Alabama denied without opinion Steven Lanier Cumbie's Application for Rehearing. The Supreme Court of Alabama denied without opinion

Steven Lanier Cumbie's Petition for Writ of Certiorari to the Court of Criminal Appeals.

The basis for jurisdiction in the Circuit Court of Mobile County, Alabama is Section 12-11-30, Code of Alabama (1975) which confers exclusive original jurisdiction of all felony prosecutions of this Circuit Court.

The Federal question sought to be reviewed by this petition was first raised in the Circuit Court of Mobile County, Alabama prior to trial by Motion to Suppress the evidence. After reading the transcript of the preliminary hearing had on January 9, 1985, the Mobile County Circuit Court denied Petitioner's

Motion to Suppress. After being sentenced to 15 years in the State Penitentiary and fined $50,000.00 Petitioner raised the issue of the violation of his Fourth Amendment to the United States Constitution right to be free from unreasonable search and search in the Court of Criminal Appeals of Alabama. The Court of Criminal Appeals denied Petitioner oral argument and affirmed without opinion the decision of the Circuit Court of Mobile County, Alabama. Court of Criminal Appeals then denied without opinion Petitioner's Application for Rehearing. The Supreme Court of Alabama then denied without opinion Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals.

ARGUMENT

UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST ENUNCIATED BY ILLINOIS V. GATES, THE AFFIDAVIT SUBMITTED IN SUPPORT FOR SEARCH WARRANT FOR THE RESIDENCE OF STEVE CUMBIE IS INSUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE.

Placing a great deal of emphasis and importance upon the need for, and value of, corroboration of details of an informant's tip by independent police work, this Honorable Court in Illinois v. Gates, 462 U.S. 213, 76 L.Ed2d. 527, 130 S.Ct. 2317 (1985), abandoned the "two prong test" of Aguillar - Spinelli, by reaffirming the "totality of the circumstances analysis" in determining whether an affidavit for a search warrant established probable cause. Aguillar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed2d

723 (1964). Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed2d 637 (1969). In the Gates opinion, at 550 551, this Honorable referred to Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725, 4 L.Ed2d 697 (1960), wherein it was held that an affidavit may rely on hearsay to establish probable cause "so long as a substantial basis for crediting the hearsay is presented." The Court then pointed out that in Aguillar the "two-prong test" would not have been established if the police officers had made some effort to corroborate the informant's information. The Court concluded its comments on the indispensable value of independent police work, corroboration

of an informant's tip, by giving a detailed statement of the case of Draper v. United States, 358 U.S. 307, 3 L.Ed2d 327, 79 S.Ct. 329 (1959). In Draper, supra, the informant's information and predictions was detailed and were "personally verified in every facet" by the arresting officer.

This Honorable Court then applied these three (3) cases to the facts of Gates, supra. In Gates, the police had received an anonymous hand written letter giving a detailed account of the procedures employed by Sue and Lance Gates to obtain drugs from Miami, Florida. The letter then predicted that on May 3rd, Sue Gates would drive a car to Miami, Florida, that Lance Gates would fly down a few days later,

and that Lance Gates would drive the car back with over $100,000.00 in drugs in the trunk. All of the information contained in this anonymous letter was corroborated by the police in the following manner:

1. A record check revealed a drivers license in the name of Lance Gates residing at the address given in the letter as his home;

2. L. Gates had made a reservation on Eastern Airlines Flight 245 to West Palm Beach Florida scheduled to depart on May 5;

3. Gates had boarded the flight;

4. When Gates arrived in West Palm Beach, Florida he went to a motel room registered to one Susan Gates;

5. The next morning Gates and an unidentified woman left the motel in a car bearing Illinois License Plates driving northbound on an interstate frequently used by travelers going to the Chicago area;

6. A check of the license tag number revealed it was registered as owned by Gates. Gates, at 540-541.

This Honorable Court then held:

> "The Illinois Supreme Court concluded and we are inclined to agree that standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities. Something more was required, then,

> before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates' home and car(cites omitted)...The corroboration of the letter's, predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north towards Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. ... Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." Gates at 541, 552.

In the present case presented by this Petition, the anonymous tip did not contain any details of facts and conditions existing at the time of the tip, or any claim of future actions to be taken. There is nothing in the anonymous tip from which a magistrate could conclude that the source was honest or his information was reliable, and there is no indication of

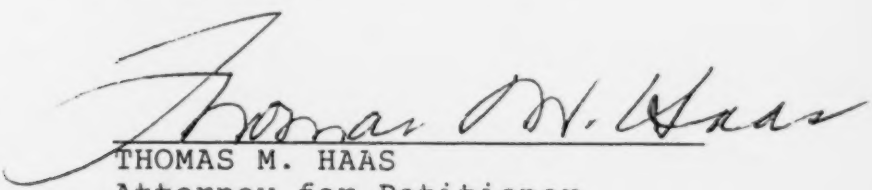
the basis of the anonymous tipster's knowledge. As reflected by the affiant's entire testimony, there was absolutely no independent police effort to corroborate any aspect of the anonymous tip received on September 17, 1984. The affiant did, however, make bare bones conclusory statements in his affidavit in an attempt to shore up his anonymous tip, but as in Aguillar v. Texas, 378 U.S. 108, 12 L.Ed2d 723, 84 S.Ct. (1964), such "is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." The affiant did not state what the details of the information were, he did not state how they were proven true, and he did not state what details justified his

conclusion that they were normally associated with drug law violators. (He did not give time, date or place where these other alleged possessions have occurred, so there are no details and it is mere conclusory.)

The "totality of the circumstances analysis" is far more consistent with the fluid concept of probable cause than is the rigid demand of the "two-prong test, but the informant's "veracity", "reliability", and "basis of knowledge" are valuable factors to be used in the totality of the circumstances analysis. There is no showing of veracity, reliability or basis of knowledge in the present affidavit. There is absolutely no corroboration of any aspect of the anonymous tip. This "bare bones" affidavit is but mere

conclusions, suspicions, and hearsay from an anonymous source of unknown value. Therefore, the issuing judge did not have a "substantial basis for... conclud(ing)" that probable cause to search Steven Lanier Cumbie's residence existed. Steven Lanier Cumbie was subjected to an unreasonable search and seizure in violation of his Fourth Amendment rights, and thus, this cause is due to be reversed.

Respectfully submitted,



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APPENDIX

WAIVED TRIAL BY JURY - TRIED BY THE COURT WITHOUT THE INTERVENTION OF A JURY - VERDICT - JUDGMENT - SENTENCE - ORAL NOTICE OF APPEAL - SUSPENSION OF SENTENCE SUSPENDED PENDING APPEAL - ORDER FIXING AMOUNT OF APPEAL BOND

DATE THURSDAY, MARCH 27, 1986

STATE OF ALABAMA) Trafficking
Byrd -vs- CC85- 1228) Cocaine -
(White Male - Age)) Defendant
) waived

trial by jury - Defendant tried by the Court without the intervention of a jury - Found guilty - Adjudged guilty - Sentenced to imprisonment in penitentiary for 15 years - Fined $50,000.00 and costs - Oral Notice of Appeal - Sentence suspended pending appeal - Appeal Bond set at $7500.00 Corporate Sureties. Defendant's attorney, Jim Byrd, in court.

This day in open court came the State of Alabama by its District Attorney and the defendant in his

own proper person and with his attorney, Jim Byrd, and the defendant having heretofore on the 16th day of May, 1985, waived reading of the indictment in this case charging him with the offense of Trafficking Cocaine, to which indictment the defendant plead not guilty, and the trial of this case having been regularly set for this day and the defendant having waived trial by jury, this case is tried by the Court -without the intervention of a jury, and the Court, after hearing the evidence in this case renders judgment find the defendant guilty.

Thereupon in open court on this day the defendant being asked by the Court if he had anything to say why the judgment and sentence of the law

should not be passed upon him, replied, "he had not"; It is therefore considered and adjudged by the Court that the defendant is guilty of the offense of Trafficking Cocaine as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the defendant be sentenced to imprisonment in the penitentiary of the State of Alabama for the term of Fifteen (15) years.

And it is further ordered and adjudged by the court that the defendant also pay a fine of $50,000.00 and the costs of this prosecution.

And thereupon in open court at the time of sentence, the defendant

gave notice of appeal, and moved the court to suspend the execution of the sentence pending appeal, and to fix the amount of an Appeal Bond.

It is therefore ordered and adjudged by the court that the execution of the sentence in this case be and the same is hereby suspended pending appeal, and that the amount of the Appeal Bond be and the same is hereby fixed at $7,500.00 Corporate Sureties.

Thereupon in open court on this day, defendant's attorney, Jim Byrd was in court.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

1st Div. 283 MOBILE Circuit Court
CC85 1228

STEVEN CUMBIE,
Appellant
vs.

State of Alabama,
Appellee.

You are hereby notified that on September 9, 1986 the following indicated action was taken in the above styled cause by the Court of Criminal Appeals of Alabama:

Affirmed on appeal. No opinion.

original signed

Mollie Jordan,
Clerk
COURT OF CRIMINAL
APPEALS OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
MONTGOMERY 36101

1st Div. 283 MOBILE Circuit Court
CC85 1228

STEVEN CUMBIE,
Appellant
vs.

State of Alabama,
Appellee.

You are hereby notified that on October 14, 1986 the following indicated action was taken in the above styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) A.R.A.P., motion denied. No Opinion.

original signed

Mollie Jordan,
Clerk
COURT OF CRIMINAL
APPEALS OF ALABAMA

30.

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 5, 1986

86 141

EX PARTE: STEVEN CUMBIE

PETITION FOR WRIT OF CERTIORARI

(Re: Steven Cumbie v. State)

CCA 1/283

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

SHORES, J. TORBERT, CJ., JONES, ADAMS & STEAGALL, JJ., CONCUR.

I, ROBERT G. ESDALE, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 5 day of Dec. 1986.

original signed

Clerk, Supreme
Court of Alabama

CERTIFICATE OF SERVICE

I, THOMAS M. HAAS, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari on the Hon. Don E. Siegelman, Attorney General for the State of Alabama, by depositing same in the United States mail at the United States Post Office, 250 St. Joseph St., properly addressed and first class postage prepaid thereon on this 2 day of February, 1987 at Mobile, Alabama.

Thomas M. Haas

THOMAS M. HAAS